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IN THE

Supreme Court of the United States

October Term, 1943.

No. 200.

ANTON MAHNICH,

Petitioner,

v.

THE SOUTHERN STEAMSHIP COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF RESPONDENT.

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IN THE

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No. 200. OCTOBER TERM, 1943.

ANTON MAHNICH,
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v.

THE SOUTHERN STEAMSHIP COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R.* 242, PR. 1) is reported in 45 F. Supp. 839.

The opinion of the United States Circuit Court of Appeals for the Third Circuit after first argument (PR. 5) is reported in 129 F. (2d) 857.

The opinion of the United States Circuit Court of Appeals for the Third Circuit after reargument (PR. 5) is reported in 135 F. (2d) 602.

*References to the typewritten record shall be designated "R" followed by the page number of the typewritten record and references to the printed record shall be designated "PR" followed by the page numbers of the printed record.

STATEMENT OF THE CASE.

The petitioner filed a libel against the respondent, alleging two causes of action; (1) for damages as a result of injuries caused by the negligence of respondent, and (2) for maintenance and cure. (R. 1-6.)

The respondent filed Exceptions and Exceptive Allegations to the Libel contending that if the Libel was intended to state a cause of action under the Jones Act (41 Stat. 1007, 46 U. S. C. A. 688) it was barred by limitation, and if it was intended to state a cause of action under the general maritime law, the libellant was guilty of laches. (R. 7-13.) The petitioner filed an Answer to the Exceptive Allegations. (R. 14-17.)

After argument on the Exceptions, the libellant filed a withdrawal of all references to the Jones Act, and based his suit solely on rights afforded by the general maritime law. (R. 18.)

The libellant thereafter filed an Amended Libel alleging that the accident and the resultant injuries were due to the unseaworthiness of the vessel and carelessness of the respondent for which he was entitled to (1) indemnity, and (2) maintenance and cure. (R. 20-24.) Answer was filed by the respondent (R. 25-28), and the case was heard by the Honorable William H. Kirkpatrick at which time testimony was adduced showing the following facts.

The petitioner is an American merchant seaman who was employed by respondent as an able seaman on its vessel *Wichita Falls*, which vessel was engaged in the coastwise trade between Philadelphia and Houston. (R. 34, 56.)

On August 17, 1934, while the vessel was at sea, petitioner, after standing his wheel watch, was assigned (with another member of the crew) to paint the front of the

bridge. The scaffold upon which he was to work had already been rigged by the boatswain. The stage consisted of a wooden plank about twenty feet long, one foot wide and two inches thick and weighed approximately fifty or sixty pounds. (R. 36, 37.) The stage was supported by two manila ropes, one on either end, extending up the front of the bridge and secured on the back of the pilot house. (R. 37, 38.) The rope, according to the chief officer, was three inches in circumference (R. 220), and, according to the boatswain, was a little wider than a twenty-five cent piece and a little less than a half dollar. (R. 215.)

Petitioner got on the scaffold, the ropes of which looked safe to him (R. 69), and, just as he started to paint, one of the ropes holding the staging broke, and he fell about fifteen feet to the deck below with resultant serious injuries. (R. 39.) Immediately after the accident, the rope appeared to petitioner to be decayed where it had parted (R. 40, 68) but, except where torn, it looked like good new rope. (R. 40.) The first mate testified that he and the boatswain, before rigging the scaffold, had examined the rope right through and did not see any place where it was bad or showed that it was rotten. (R. 221.) The boatswain and first mate tested the rope by twisting it counterwise. (R. 221.) The rope was cut from a coil of new rope fifteen hundred feet long, which had been in the lyle gun box for over two years and had never been used. (R. 228.) The coil of fifteen hundred feet, after having been cut, was then replaced by a brand new rope. (R. 221.) The lyle gun was used for practice drill every three months, but an old rope was used on those occasions. (R. 228.) The lyle gun is used in case of emergency for life saving at sea. (R. 221.) The mate also

testified that there was aboard the vessel a coil of probably three-quarter inch rope and another coil of two and three-quarter inch rope (R. 222), the latter of which coils was new and used for rigging scaffolds, etc. (R. 222.)

The Trial Judge, although he held that petitioner was not guilty of laches, found, in addition to the above facts, that the rope which was used, if it had been sound, would have been adequate (R. 243, PR. 2) and that neither the coil nor the extra rope on board was shown to be defective or unsuitable (R. 244, PR. 2) and, therefore, held that the *Wichita Falls* was not unseaworthy, dismissing the cause of action for indemnity. (R. 244, 245, 248, PR. 1-5.) The decree of the District Court was affirmed by the United States Circuit Court of Appeals for the Third Circuit, after reargument, on the opinion of Circuit Judge Goodrich, Circuit Judge Biggs dissenting. (PR. 5-11.)

The United States Circuit Court of Appeals for the Third Circuit, in affirming the decree of the District Court, found that the accident to petitioner was due to the negligence of the Chief Officer of the *SS. Wichita Falls* in failing to detect a weakness of the rope which was used to support the staging upon which the petitioner was working while painting the ship. (PR. 6.) That Court further found that the rope which was taken from the Lyle gun box had not theretofore been used; also that there was an ample supply of good rope on board the ship at the time of the acts complained; and that therefore no unseaworthiness of the ship was proved. (PR. 6.)

The United States Circuit Court of Appeals for the Third Circuit held on the authority of *Plamals v. Pinar del Rio*, 277 U. S. 151 (1928), that under the general maritime law of the United States there could be no recovery for the

negligence of the mate in selecting a defective rope from an ample supply of good rope as such act by the mate did not establish unseaworthiness of a ship so as to entitle an injured seaman to indemnity under the maritime law. Accordingly, the Court-below affirmed the decree of the Trial Court awarding indemnity in part only for maintenance and cure and not for unseaworthiness.

ARGUMENT.

A Vessel Which Contains on Board an Ample Supply of Good Rope Is Not Unseaworthy so as to Permit a Seaman to Recover Indemnity From the Vessel and Her Owner for Injuries Incurred as the Result of the Use During the Voyage of a New But Defective Rope Selected by the Mate After Due Inspection.

This identical question has already been decided by Your Honorable Court in *Plamals v. SS. Pinar Del Rio*, 277 U. S. 151 (1928). It is still the law, is a sound decision, and should not be overruled.

In *The Pinar Del Rio* the seaman, like the petitioner herein, was injured when working on a paint job. While he was in a boatswain's chair painting the funnel, the rope broke causing him to fall to the deck. In that case, like the present, the accident occurred because the mate had selected and used a bad rope when an abundant supply of good rope was on board. Your Honorable Court held, speaking through Mr. Justice McReynolds, that:

> "The accident resulted from the negligence of the mate who selected a defective rope. An abundant supply of good rope was on board." (Page 154.)
>
> . . . . .
>
> "The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." (Page 155.)

The petitioner herein contends that the aforesaid statement was merely dictum and "not a decided issue, and did not reflect the opinion of any other than the writer" and further, somewhat in the nature of a plea of confession

and avoidance, that, even if it was the law, it was overruled by the subsequent case of *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424 (1939).

The petitioner is in error in both contentions.

A. The Pinar Del Rio.

While the greater part of the decision in *The Pinar Del Rio* concerns the question whether a cause of action under the Jones Act is a lien against the ship which can be enforced in admiralty by a libel in rem, other questions were presented and considered by Your Honorable Court.

An examination of the briefs will show that the precise question now on review was raised by the petitioner therein, and answered by the respondent therein, in Point V of the Brief of Petitioner on the Writ of Certiorari, and in Point IV of Respondent's Brief on the Writ of Certiorari.

The aforesaid Point V of petitioner's brief in *The Pinar Del Rio*, reads as follows:

"Point V.

"Under the general maritime law, independent of the Jones Act, libellant was entitled to recover for respondent's failure to supply and keep in order proper appliances, including a proper bos'n's chair and proper gantline, properly rigged, and for the unseaworthiness of the vessel in this respect."

The aforesaid Point IV of respondent's brief in *The Pinar Del Rio* reads as follows:

"Point IV.

"Even if American law as laid down by this court in 'The Osceola', 189 U. S. 158, is applicable to this case, petitioner failed to make out any cause of action be-

cause the accident was due to the negligence of a fellow servant."

Moreover, the petitioner in *The Pinar Del Rio* not only raised under said Point V the precise question now on review but as authority for that proposition cited in his brief in support of petition for certiorari and in his brief on certiorari many of the same cases which the petitioner herein now cites in his brief, to wit, *The Osceola*, 189 U. S. 158 (1903); *The Noddleburn*, 28 Fed. 855 (D. C. Ore. 1886); *The Julia Fowler*, 49 Fed. 277 (D. C. S. D. N. Y. 1892), and *The Navarino*, 7 F. (2d) 743 (D. C. E. D. N. Y. 1925).

That Your Honorable Court fully considered this identical question in *The Pinar Del Rio* is further evidenced by the summaries of the argument for petitioner and the argument for respondent appearing on page 153 of 277 U. S., where the petitioner is reported as having contended:

> "Under the general maritime law, independent of the Jones Act, libellant was entitled to recover for respondent's failure to supply and keep in order, proper appliances, including a proper bos'n's chair and proper gantline, properly rigged, and for the unseaworthiness of the vessel in this respect."

and where the respondent is reported as having contended:

> "Even if American law as laid down by this Court in *The Osceola*, 189 U. S. 158, is applicable to this case, petitioner failed to make out any cause of action because the accident was due to the negligence of a fellow servant."

As stated by Judge Goodrich in the Court-below, "the 'Pinar Del Rio' decision seems to be squarely on the point". (PR. 7.) Moreover, it is of no legal significance that Mr. Justice McReynolds decided this question in such a succinct manner rather than in an elaborate lengthy dissertation As also expressed by Judge Goodrich:

"While the opinion, it is true, does not discuss the matter at length we do not think that the authority of the case as a decision on this point can be disregarded by us because the Court, through the writer of the opinion, chose to dispose of the matter in three lines instead of three hundred." (PR. 7.)

We submit that the decision in *The Pinar Del Rio* has settled the question herein raised.

General Maritime Law.

It is conceded that the shipowner is under a duty at the commencement of the voyage to make the vessel seaworthy, and that he is liable for the breach of that duty without regard to negligence. However, in this case there is no proof by the petitioner that at the commencement of the voyage the vessel was unseaworthy.

The respondent's duty was fulfilled when at the commencement of the voyage the vessel had an ample supply of good rope on board, and both the Trial Court and the Circuit Court of Appeals found that as a fact: (PT. 2, 3, 6.)

Notwithstanding petitioner's contention, with which we do not agree, that "the trend of the prior cases" was otherwise, the following decisions both prior and subsequent to *The Pinar Del Rio* show that the general maritime law does not give the petitioner the redress which he seeks herein but which he might have obtained under the Jones Act, if he had acted promptly.

In *Roebling's Sons Co. of New York v. Erickson*, 261 Fed. 986 (C. C. A. 2nd, 1919), in which your Honorable Court denied certiorari in 252 U. S. 585 (1920), it was contended that the vessel was unseaworthy by reason of the

fact that the master directed the discharging of cargo in a dangerous manner departing from a previous safe method. The master directed the seamen to put a stick under the end of logs to hold them while the tackle was being disengaged. The stick, which was an ordinary piece of dunnage, was defective. The court held that the adoption of a dangerous method of discharging the cargo by the master was an improvident order, amounting to negligence, and that the use of the dunnage for a purpose for which it was not intended did not constitute unseaworthiness.

In that case the instrumentality or "appliance" which was chosen was not adapted to or fit for the use to which it was put.

The court said:

> "There would, however, be little security for careful owners if, after furnishing a seaworthy ship and proper appliances, they were still liable for the act of the master in not using the proper appliances furnished, or in using them for purposes for which they were not furnished." (Page 988.)

In *The Petroline*, 271 Fed. 273 (C. C. A. 2nd, 1921) the seaman sought indemnity because of the unseaworthiness of the vessel in not providing a hatch cover with proper braces. He claimed that in opening the hatch cover so as to afford air to the hold below the stick or block of wood used to hold up the hatch, which fell on his hand, was worn, defective and inadequate. While the Court held that libellant had not shown "that a defective block was used which brought about the happening of the accident", it further stated on page 276:

> "It also appears that, if there was a worn, defective block, there were others available for use, and the

master, therefore, did not provide a ship which was unseaworthy. Hanrahan v. Pacific Transport Co. (C. C. A.) 262 Fed. 951."

In *The Birkenhead*, 51 F. (2d) 116 (D. C. E. D. Pa. 1930) the seaman was injured while using a monkey wrench to tighten a nut. While so doing, the wrench, which was defective, slipped, and he fell. The court found as a fact that there were numerous wrenches of all kinds on board, which were available for use, and, therefore, held that the vessel was seaworthy.

In *The James E. Ferris*, 1 F. Supp. 1018 (D. C. W. D. N. Y. 1932) a seaman injured his back and claimed indemnity because of unseaworthiness. At the time of the injury a cable, which had been put out to the dock, was being returned to the ship. A heaving line attached to the end of the cable which was being drawn up caught on the lip of the chock and parted. The libellant was caused to fall backwards and sustained severe injuries. The libellant attempted to prove the ship did not have a sufficient supply of heaving lines, but the evidence showed an ample supply of good rope. Furthermore, like the instant case, prior to its use, the line, which was new, had been inspected by the master. Indemnity was denied on the authority of *The Pinar Del Rio*.

Petitioner's Cases.

The cases cited by petitioner are readily distinguishable and do not support the proposition that the shipowner is liable for injury due to defective supplies, such as the rope in question, when an ample amount of good supplies was available.

J. R. Hanify Co. v. Westberg, 16 F. (2d) 552 (C. C. A. 9th, 1926) was a suit by a longshoreman, not a seaman,

against his employer for furnishing a sling of insufficient strength in the loading of defendant's schooner. While the Court stated the case was decided as a "proceeding in maritime tort", there was no discussion as to seaworthiness of the vessel as herein presented but merely the short quoted paragraph as to the effect of the selection of a defective appliance by a fellow servant.

In *The Portland*, 213 Fed. 699 (D. C. Ore. 1914), the suit was by a stevedore, not a seaman. He was injured by reason of the fact that the rope parted in a sling which had been made up on the vessel from bales of rope under the direction of the mate whose duty it was to inspect the slings and to determine their strength and fitness for use. The stevedores were furnished a larger number of slings than they actually required for use and to that extent had a limited choice as to the ones which would be used.

That case is not controlling here as there was not the relation of master and servant as between the owner and stevedore, and the general rule is that the former would be liable to the latter, a business invitee, for *any negligence of any type* that caused his injury.

As heretofore stated *The Julia Fowler*, *supra* and *The Navarino*, *supra*, were cited in the briefs in *The Pinar Del Rio* but not by Your Honorable Court in that case. *The Julia Fowler*, *supra*, involved the use of a halliard which was *known* to be defective, and there was no finding by the court that ample sound rope was available, although reference was made in the opinion to proper rope and readjustments. Again the question of seaworthiness as here involved was not presented. *The Navarino*, *supra*, is likewise inapplicable because it involved a defective block which by its own nature was an appliance.

In *The Noddleburn, supra*, the seaman was injured when a crane line broke, causing him to fall. Prior to the accident the mate had been informed that the crane line was insufficient and had ordered it repaired, but his order was countermanded by the master. The crane line in question was part of the rigging of the foremast back-stay and the after foremast shroud. This case involved not a choice of supplies to be used in performing some work to be done, but in the master permitting the crane line which was a part of the *ship's rigging* to remain in an unsecure condition. The discussion by the court in *The Osceola* would indicate that it did not consider that liability in *The Noddleburn* was founded upon a mere negligent act.

In *Olson v. Flavel*, 34 Fed. 477 (D. C. Ore. 1888), the appliance was not defective but for purposes of loading coal the master who knew of the difficulties should have either used a wider gangplank or used an iron chute on the dock.

The Phrase "Appliances Appurtenant to the Ship" Does Not Include All Consumable Supplies.

While the rights of seamen under general maritime law as defined in *The Osceola*, 189 U. S. 158, 175 (1903) include, *inter alia*,

> "2. That the vessel and her owner are both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship: *Scarff v. Metcalf*, 107 N. Y. 211."

we do believe that the words "the proper appliances appurtenant to the ship" means everything about a ship. If so, then the owner would be absolutely liable when an injury

was caused by the breaking of anything. This would make him an insurer of his crew.

In *The Henry B. Fiske*, 141 Fed. 188, 190 (D. C. Mass., 1905), the court said:

> "As regards the crew employed on board a vessel, there is no warranty on her part that none of her fittings or appliances shall at any time give way, to their injury."

The cases indicate that no such onerous duty lays upon a shipowner. If such were the case, there would have been no occasion for the progressive remedial legislation which has been enacted for the benefit of seamen. The Jones Act, which is most liberal, does not impose so heavy an obligation. The seamen under that Act must at least prove some fact from which an inference of negligence may be raised.

We are not concerned in this case with an injury resulting from a defect in the hull, engines or any of the ship's permanent fittings, but one which arose from an improper selection of a consumable supply.

The staging, as it was rigged at the time of the accident, cannot be considered a normal appliance of the ship. The phrase "keep in order" indicates that the objects contemplated were something more permanent than consumable supplies.

The staging consisted of ropes, pulleys, a plank and other rigging, all of which had to be assembled from the ship's general supplies. The mate in charge determined the amount and character of supplies which were to be used. Instead of using rope, the mate might well have directed the use of chains or wire cable.

The staging was not a permanent part of the ship; it was put up and taken down from time to time as occasion

required. Thus it was nothing more than a collection of various parts of the ship's supplies molded into a unit to be used temporarily to do a particular job.

The putting up of the staging so that the paint could be washed down was part of the ship's operating routine, and if it was not done properly, it was a matter of "operating negligence."

The negligence in this case was that of the mate in selecting a defective piece of rope when there was on board a sufficient quantity of good rope. In other words, there were adequate supplies, but they were not used.

Thus the situation in this case is analogous to that in *Roebling's Sons Co. of N. Y. v. Erickson, supra.*

There is a clear distinction between the furnishing of adequate supplies of a general character which may be used for a number of different purposes, and the furnishing and maintaining of other integral pieces of equipment which are put to definite uses. We believe that the rope which was used and which obviously falls in the former class, was therefore not within the scope of "appliances appurtenant to the ship".

It is not possible to repair and keep in order things which are being continuously used and worn out, such as rope. When that situation arises, it is the duty of the vessel to replace the used supplies with others. The seaworthiness of the vessel with respect to supplies during a voyage, therefore, depends upon having available on board sufficient quantities of such supplies. Both courts-below found that there was an adequate supply of good rope on board the vessel. (PR. 2, 6.)

It is significant that your Honorable Court in *The Osceola, supra*, did not specify "supplies" if they were intended to be included in the word "appliances". The pres-

ence of sufficient consumable supplies is necessarily included in the term "seaworthy".

The Defect in the Rope Used Was Latent and Not Ascertainable on Inspection.

Furthermore, even if it be assumed that it was such an appliance, the evidence in the case does not establish that the defect was known or one which ought to be known, even though the Trial Court found that the rope was "unquestionably rotten or defective at the point at which it broke." (PR. 2.) The mate and the boatswain examined the rope prior to its use and did not see any place where it was bad or rotten. (R. 221.) They tested it by twisting the rope counterwise. (R. 221.)

Seaworthiness is a relative term and is not synonymous with safety. As stated in *The Henry B. Fiske, supra* at page 190, the shipowner is only liable for having failed to use reasonable care and for defects which could have been discovered. See also *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951 (C. C. A. 2d, 1919).

After the vessel has been adequately supplied for the voyage there is no absolute continuing warranty on the part of the shipowner that all the supplies will at times during the voyage remain safe.

It is not disputed that there is an absolute duty upon the shipowner to make the vessel safe and seaworthy and properly equipped and supplied at the commencement of the voyage.

The cases, as we understand them, however, do not support the libellant's contention that there is an absolute continuing obligation at all times during the voyage on the part of the shipowner to keep all of the supplies safe.

The case of *Hough v. Texas and Pacific R. R. Co.*, 100 U. S. 213 (1879), is not applicable because it concerns common law rights of employees working on the shore and not the special maritime rights of a seaman to indemnity for injuries resulting from unseaworthiness of a vessel or for failure to provide proper maintenance and cure. Likewise, *The Noddleburn, supra, The Portland, supra,* and *The Julia Fowler, supra,* are not applicable for the reasons hereinbefore set forth on pages 12 and 13.

In *H. A. Scandrett*, 87 F. (2d) 708, (C. C. A. 2nd, 1937) one of the doors which the seaman had to use was stuck and when he pulled on the knob, it came loose causing him to fall. It was specifically found that at the commencement of the voyage the vessel was unseaworthy and that the unseaworthiness was due to the improper construction of the door and the defective condition of the lock thereon. Inasmuch as the unseaworthiness existed at the commencement of the voyage, it was properly held that the shipowner was liable. In that case the court was not concerned with a separate appliance such as a wrench or other type of hand tool. The defect was in a part of the ship's permanent fittings.

In *The Secandbee*, 103 F. (2d) 577, (C. C. A. 6th, 1939) the plaintiff was injured when he fell against the moving parts of a pump which was adjacent to a narrow passageway. The vessel at that point lacked a guard rail, the presence of which the court found would have prevented the accident. Here again the fault was in maintaining a continuous unsafe condition. This condition existed at the commencement of the voyage and was not the result of some act or operation during the course of it.

We think there is a distinction between the duty of making the vessel seaworthy in respect of her hull, machin-

ery, fittings, and working conditions, and the obligation to furnish adequate supplies.

An owner, having furnished adequate supplies at the commencement of the voyage, is not liable if injuries result from the failure to use them properly, to wit, the negligence of the mate in this case in selecting a defective piece of rope when there was on board a sufficient quantity of good rope.

We therefore submit that Mr. Justice McReynolds in *The Pinar Del Rio* correctly expressed the general maritime law when he said:

> "The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." (Page 155.)

B. The Pinar Del Rio Has Not Been Overruled by the Case of Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424.

The Petitioner, arguing in the alternative, contends that if *Plamals v. SS. Pinar Del Rio, supra*, was the law, it has been overruled by the case of *Socony-Vacuum Oil Co. v. Smith, supra*.

This contention was properly dismissed by the Court below as follows:

> "The libellant urges also that this portion of the 'Pinar Del Rio' decision is no longer authority after the opinion of the majority of the Court in Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265. The sole question in that case, however, was whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance, on the ship instead of a known safe

method of doing his work. All of the discussion in the opinion by Mr. Justice Stone is directed to this point. The decision was one under the Jones Act. *"We do not, as we read the opinion, find even a dictum to support the position of the libellant here."* (Italics ours.) (PR. 7.)

As above stated by Judge Goodrich, the decision in the *Socony-Vacuum Oil Co.* case was one under the Jones Act, and, as we read the decision, we too do not find "even a dictum to support the position" of the petitioner.

The case of *Plamals v. SS. Pinar Del Rio, supra*, is not mentioned in any of the briefs before Your Honorable Court in that case; nor is there any mention of it in Mr. Chief Justice Stone's opinion.

In *Socony-Vacuum Oil Co. v. Smith, supra*, the petitioner contended that assumption of risk was a defense in a proceeding under the Jones Act and that *The Arizona v. Anelich*, 298 U. S. 110 (1936) and *Beadle v. Spencer*, 298 U. S. 124 (1936) would not be modified by denying recovery. The petitioner was not successful, but Your Honorable Court in the *Socony-Vacuum Oil Co.* case sustained the respondent's contention that the petitioner not only had failed to prove a defense of voluntary assumption of risk but also that such was not a defense *in a suit brought under the Jones Act*, even though the seaman chose to use a defective *appliance* (as distinguished from supplies heretofore discussed in pages 13 to 17 *supra*) when the seaman knew it to be unsafe.

While *Olson v. Flavel, supra*, and *The Julia Fowler, supra*, are cited in the quotation from the *Socony-Vacuum Oil Co.* case appearing on page 15 of petitioner's brief, the attention of Your Honorable Court is called to the fact that these cases were therein cited on the question of assump-

tion of risk, and are not in point on the question here under review. *Olson v. Flavel, supra,* as above-stated, concerns the use of a defective appliance (a block) and not a consumable supply like a rope, while in the *Socony-Vacuum Oil Company* case at page 432, Your Honorable Court recognized that in *The Julia Fowler* the officer deliberately used "a halliard known to be defectively spliced".

The *Socony-Vacuum Oil* case instead of overruling *The Pinar Del Rio*, as contended by petitioner, brings into sharper relief the difference between the various rights which an injured seaman has.

As heretofore indicated, there is a marked difference between seaworthiness and negligence and between enforcement of rights under the general maritime law and under the Jones Act.

While the Jones Act is remedial and was enacted for the benefit of seamen, giving them rights which they would not overwise have had and while it permits proofs different from that under the general maritime law, the Jones Act also conditioned those rights on suit being instituted within a specified time.

In this case, while the Trial Court found that the petitioner was not guilty of laches in the proceeding under general maritime law as set forth in petitioner's Amended Libel (R. 20-24), it was conceded by petitioner's counsel that he was barred by the aforesaid limitation from pressing any claim under the Jones Act. Therefore, the petitioner, after exception by the respondent, withdrew all reference to the Jones Act in his original Libel, which was based on negligence, and amended the same to a cause of alleged unseaworthiness under the general maritime law.

If the petitioner had not allowed the statute of limitations in the Jones Act to run against him, undoubtedly he

would have continued his original action under the Jones Act and not attempted to establish a claim of unseaworthiness. The respondent should not now be penalized for the petitioner's tardiness so as to give petitioner under the general maritime law rights properly enforceable under the Jones Act.

The rights and liabilities under the general maritime law should be kept separate and distinct from those under the Jones Act, nor should a decision under the Jones Act be construed to overrule inferentially and without any reference thereto a specific holding of Your Honorable Court with reference to rights and liabilities under the general maritime law. Both the *Socony-Vacuum Oil Co.* case and *The Pinar Del Rio* are proper decisions in their own particular spheres of maritime jurisprudence, and neither adversely affects the other.

CONCLUSION.

We, therefore, submit *Plamals v. S.S. Pinar Del Rio* is still the law, is a sound decision and should not be overruled. The decree of the United States Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1943.

Anton Mahnich, Petitioner,
vs.
The Southern Steamship Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 31, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner, a seaman on respondent's vessel, the "Wichita Falls", was injured, while at sea, by a fall from a staging, which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging. The question is whether the defect in the staging was a breach of the warranty of seaworthiness rendering the owner liable to indemnify the seaman for his injury.

Petitioner brought this suit in personam in admiralty in the District Court for Eastern Pennsylvania, to recover indemnity and maintenance and cure. On the trial the evidence showed that the mate ordered petitioner to paint the bridge and to stand on the staging for that purpose. The staging consisted of a board supported at both ends by rope which, if sound, was sufficient in strength to sustain the stage and its load. The boatswain, by direction of the mate, had cut the rope for the staging from a coil, which had been stored for two years in the Lyle gun box. The rope, intended for use with the Lyle life-saving apparatus, had never been used. There was testimony that it had been examined and tested by the boatswain and the mate and that it was generally sound in appearance. After the accident, examination of the rope at the point where it broke showed that it was so rotten as to be inadequate to support the strain imposed upon it.

The trial judge concluded from the evidence that there was sound rope on board available for rigging the staging. He found that there was no fault in the manner in which the stage had been rigged, but that the rope selected by the mate was defective and that petitioner's injury was attributable to the negligence of the

boatswain and the mate in failing to observe the defect.[1] He held that the proceeding was brought too late to recover for the negligence under the Jones Act, and that the "Wichita Falls" was not unseaworthy by reason of the defective rope used in rigging the staging, citing *Plamals* v. *The Pinar Del Rio*, 277 U. S. 151, 155. He accordingly denied indemnity to petitioner, but gave judgment in his favor for maintenance and cure.

The Court of Appeals for the Third Circuit affirmed, 129 F. 2d 857, 135 F. 2d 602, by a divided court, resting its decision on the statement quoted from the opinion in *The Pinar Del Rio, supra*, 155, that "The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." We granted certiorari, 320 U. S. —, upon a petition which urged that the statement quoted from *The Pinar Del Rio, supra*, does not rule this case, and that the decision below is inconsistent with the decisions in *The Osceola*, 189 U. S. 158, and in *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424.

The sole issue presented by the petition for certiorari is that of respondent's liability to indemnify petitioner for the injury suffered by reason of the defective staging. No question is raised with respect to petitioner's right to recover under the Jones Act or his right to the award of maintenance and cure or its adequacy.

A finding of seaworthiness is usually a finding of fact. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 145; *Steel* v. *State Line S.S. Co.*, L. R. 3 A. C. 72, 81-82, 90-91. Ordinarily we do not, in admiralty, more than in other cases, review the concurrent findings of fact of two courts below. *The Carib Prince*, 170 U. S. 655, 658; *The Wildcroft*, 201 U. S. 378, 387; *Luckenbach* v. *McCahan Sugar Co., supra*; *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 13; *Just v. Chambers*, 312 U. S. 383, 385. Here, however, both courts below, holding themselves bound by *The Pinar Del Rio, supra*, have, on the facts found, held as a matter of law that the staging was seaworthy despite its defect. That conclusion of law is reviewable here.

Until the enactment of the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, the maritime law afforded no remedy by way of indemnity

[1] The dissenting judge in the Circuit Court of Appeals thought that this finding of negligence on the part of the ship's officers was erroneous. See 135 F. 2d 602, 605. There was no attack on this finding here, and we have not examined the correctness of the trial judge's conclusion, for, as we will point out, the question whether there was such negligence does not control decision of the issues of this case.

beyond maintenance and cure, for the injury to a seaman caused by the mere negligence of a ship's officer or member of the crew. But the admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in *The Osceola*, *supra*, 175. *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 380-381; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 258-260; *Pacific S.S. Co.* v. *Peterson*, 278 U. S. 130, 134; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 370-371; *Warner* v. *Goltra*, 293 U. S. 155, 158; *The Arizona* v. *Anelich*, 298 U. S. 110, 120 *et seq.*; *Socony-Vacuum Co.* v. *Smith*, *supra*, 428-429; *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 40. The latter rule seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out, and was generally applied, before its statement in *The Osceola*, *supra*, by numerous decisions of the lower federal courts during the last century. See *The Arizona* v. *Anelich*, *supra*, 121, footnote 2.

This was a recognized departure from the rule of the English law, which allowed no recovery other than maintenance and cure for injuries caused by unseaworthiness, *Couch* v. *Steel*, 3 El. & Bl. 402, until the enactment of the Merchant Shipping Act of 1876, 39 & 40 Vict., Chap. 80, § 5, reenacted by the Merchant Shipping Act of 1894, 57 & 58 Vict., Chap. 60, § 458. By that statute there is annexed to every contract of service between the owner of a ship or the master and any seaman thereof, an obligation that all reasonable means be used to insure the seaworthiness of the ship before and during the voyage. See *Hedley* v. *Pinkney Steamship Co.*, [1894] A. C. 222.

In a number of cases in the federal courts, decided before *The Osceola*, *supra*, the right of the seaman to recover for injuries caused by unseaworthiness seems to have been rested on the negligent failure, usually by the seaman's officers or fellow seamen, to supply seaworthy appliances. *The Noddleburn*, 28 Fed. 855, aff'd, 30 Fed. 142; *The Neptuno*, 30 Fed. 925; *The Frank and Willie*, 45 Fed. 494; *The Julia Fowler*, 49 Fed. 277; *William Johnson & Co.* v. *Johansen*, 86 Fed. 886; and see *The Columbia*, 124 Fed. 745; *The Lyndhurst*, 149 Fed. 990. But later cases in this and other federal courts have followed the ruling of *The*

Osceola, supra, that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances.[2] *Carlisle Packing Co.* v. *Sandanger, supra,* 259-260; *The Arizona* v. *Anelich, supra,* 120 *et seq.*; *Beadle* v. *Spencer,* 298 U. S. 124, 128-129; *Socony-Vacuum Co.* v. *Smith, supra,* 428-429, 432; *The H. A. Scandrett,* 87 F. 2d 708, 710-711; cf. *The Edwin I. Morrison,* 153 U. S. 199, 210.

If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness. It is true that before the Jones Act the owner was, in other respects, not responsible for injuries to a seaman caused by the negligence of officers or members of the crew. But this is not sufficient to insulate the owner from liability for their negligent failure to furnish seaworthy appliances, see Judge Addison Brown, in *The Frank and Willie, supra,* 495-497; *Carlisle Packing Co.* v. *Sandanger, supra,* 259-260, more than their negligence relieves him from his liability for maintenance and cure. *The Osceola, supra,* 175; *Pacific Co.* v. *Peterson, supra,* 134; *Calmar S.S. Corp.* v. *Taylor,* 303 U. S. 525, 527.

It required the Harter Act to relax the exacting obligation to cargo of the owner's warranty of seaworthiness of ship and tackle.[3] That relaxation has not been extended, either by statute or by decision, to the like obligation of the owner to the seaman. The defense of the fellow servant rule to suits in admiralty for negligence, a defense precluded by the Jones Act, has never avowedly been deemed applicable to the owner's stricter obligation to the seaman of the warranty of seaworthiness.

The Osceola, supra, in answer to certified questions, laid down as separately numbered and independent propositions the rule of the owner's unqualified obligation to furnish seaworthy appliances, and the rule that the owner is not liable to a seaman for the negligence of his fellow servants. It nowhere intimated that the owner is relieved from liability for providing an unseaworthy appliance, merely because the unseaworthiness was attributable to the

[2] By statute the owner's similar obligation with respect to the carriage of goods is merely to exercise "due diligence to make the . . . vessel in all respects seaworthy". Harter Act, § 3, 27 Stat. 445, 46 U. S. C. § 192. See also Carriage of Goods by Sea Act, § 4(1), 49 Stat. 1210, 46 U. S. C. § 1304(1).

[3] See note 2, *supra.*

negligence of fellow servants of the injured seaman rather than to the negligence of the owner. Indeed, to support the rule of absolute liability, the Court, see *The Osceola, supra*, 173-175, relied on cases in which the vessel or its owner had been held liable for injuries resulting from unseaworthiness, although application of the fellow servant rule would have barred recovery. Of one, *The Frank and Willie, supra*, the Court, after pointing out that the seaman was injured by reason of the negligent failure of the mate to provide a safe place in which to work, said, "the question was really one of unseaworthiness and not of negligence."

The Court cited, discussed and relied upon *The Noddleburn, supra*, *Olson* v. *Flavel*, 34 Fed. 477, *The Frank and Willie, supra*, and *The Julia Fowler, supra*. In each the seaman was injured as a result of his use of unseaworthy appliances rendered so by the negligence of a fellow servant. In *The Julia Fowler, supra*, the injury was caused by a fall from a boatswain's chair which the Court found, as in this case, was rigged with defective rope by reason of the fault of the mate. The inapplicability of the fellow servant rule to this type of case was recognized explicitly in *The Noddleburn, supra*, 858, and in *The Frank and Willie, supra*, 495-497. And such was our holding in *Carlisle Packing Co.* v. *Sandanger, supra*, where it was said, at p. 259, "without regard to negligence the vessel was unseaworthy". See also the discussion in *The H. A. Scandrett, supra*, 710-711.

In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with safe appliances and a safe place to work, is nondelegable and not qualified by the fellow servant rule. *Hough* v. *Railway Co.*, 100 U. S. 213, 216-220; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 647-648; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 386-388; *Union Pacific Ry. Co.* v. *Daniels*, 152 U. S. 684, 688-689. It would be an anomaly if the fellow servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness, so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer.

The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See *The Osceola*, *supra*, 174-175, and cases cited. Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging. Whether petitioner knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances. *The Arizona* v. *Anelich*, *supra*, 123-124; *Beadle* v. *Spencer*, *supra*, 129-130; *Socony-Vacuum Co.* v. *Smith*, *supra*.

Nor does the fact that there was sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one. We have often had occasion to emphasize the conditions of the seaman's employment, see *Socony-Vacuum Co.* v. *Smith*, *supra*, 430-431 and cases cited, which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done. For, as was said in *The Osceola*, *supra*, 175, the owner's obligation is "to supply and *keep in order* the proper appliances appurtenant to the ship." (Italics supplied.) It is not enough that the "Wichita Falls" had on board sound rope which could have been used to make the staging seaworthy, if in fact the staging was unsafe because sound rope was not used. *The Julia Fowler*, *supra*; *The Navarino*, 7 F. 2d 743, 746; cf. *The Portland*, 213 Fed. 699.

Respondent's argument that the defective rope was a consumable supply of the vessel, not falling within the requirement that the owner must furnish seaworthy equipment appurtenant to the vessel, is inappropriate here because, as we have said, it was the stage which was unseaworthy, by reason of the use of the defective rope in its construction. The stage was used in the repair of the ship, and was as intimately associated with it and with the seaman's employment as are the gangways or other appliances or the passageways used by the seaman in doing his work.

Moreover it would not be enough to say that this case concerns a consumable supply, for in *Carlisle Packing Co.* v. *Sandanger, supra*, the owner was held liable to a seaman for unseaworthiness, where a consumable supply of the ship was stored in such fashion as to render it dangerous to the seaman who used it. There gasoline had been negligently placed in a can marked "coal oil" and the seaman was burned by an explosion which resulted when he attempted to build a fire with the gasoline which he had taken out of the can thinking it to be coal oil.

The statement from *The Pinar Del Rio, supra*, relied upon by the two courts below, could be taken to support their decision, only on the assumption either that the presence of sound rope on the "Wichita Falls" afforded an excuse for the failure to provide a safe staging, or that antecedent negligence of the mate in directing the use of the defective rope relieved the owner from liability for furnishing the appliance thereby rendered unseaworthy. But as we have seen, neither assumption is tenable in the light of our decisions before and since *The Pinar Del Rio, supra*. So far as this statement supports these assumptions, it is disapproved. We cannot follow it, and also follow *The Osceola, supra*, the cases which it approved and *Carlisle Packing Co.* v. *Sandanger, supra*. We prefer to follow the latter as the more consonant with principle and authority.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1943.

Anton Mahnich, Petitioner,
vs.
The Southern Steamship Company.
On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 31, 1944.]

Mr. Justice Roberts.

I think the judgment is wrong. The case does not present a situation calling for liberalizing the maritime law in favor of seamen by abolishing the defense of a fellow seaman's negligence. Congress did that in 1920 (41 Stat. 1007). But it required actions in such situations to be brought within two years, which it subsequently extended to three years. The sole question is whether recovery should be permitted beyond the time when Congress said action must be instituted. I should say nothing further on this question save that the method of reaching the decision seems to me contrary to right exercise of the judicial function.

The petitioner has undoubtedly obtained care and cure to which, as a seaman, he was entitled irrespective of fault on the part of owner or master. He failed timely to avail himself of his right to sue under § 33 of the Jones Act. In an action under that statute the defense of the negligence of a fellow servant would not have been open to the respondent. In an effort to obtain damages, he brought this action under the general maritime law. His recovery *vel non* under the unusual circumstances can be of little importance to others than himself and the respondent. But, in order to give him the demanded relief, the court resorts to nullification of an earlier decision: *Plamals* v. *Pinar Del Rio*, 277 U. S. 151, indistinguishable in fact and law, which has stood unquestioned for sixteen years, and applied principles settled years before in *The Osceola*, 189 U. S. 158.

The history of *Plamals* v. *Pinar Del Rio* is important. The libellant, a seaman on a British ship lying in United States waters, was ordered by a mate to repair a stack. A sling was used, for which the mate selected a piece of rope. The rope broke and the

seaman was injured. He filed a libel *in rem* against the vessel. The owner gave bond and released the ship.

The libel, after reciting the facts, alleged that the injuries were due "to the fault or neglect of the said steamship or those in charge of her in that the said rope was old, worn, and not suitable for use." The libel failed to refer to § 33 of the Jones Act, but, at the trial, the libellant's proctor stated that he relied upon it. The claimant in its answer asserted that the vessel was of British registry and, as the only redress open to the libellant was under the British Workmen's Compensation Law, the Admiralty Court should decline jurisdiction. The claimant amended its answer to deny liability on the ground that the ship was provided with proper tackle but, through the negligence of an officer, bad tackle was selected.

The District Court held that the British law,—the law of the flag,—afforded no action *in rem* nor any action for indemnity since there was an ample supply of good rope on board and the mate chose an insufficient rope for use.

On appeal the Circuit Court of Appeals held that the libellant's pleadings were inadequate but, as no point had been made of their infirmity, went on to consider "whether, on the facts proven and under any applicable law, libelant has a case."[1] It said the libellant must make out a case of maritime tort; that, under the law of England, there could be no recovery and that if the applicable law were the maritime law of the United States the libellant could not recover for the improvident or negligent act of the mate, adding: "If the vessel had been unsupplied with good and proper rope, a different question would arise."

That court further held that, although, under the Jones Act, libellant could have sued at law or filed a libel, *in personam*, the statute gave no right to a libel *in rem*. The decree dismissing the libel was, therefore, affirmed.

Petitioner sought review in this court and, in his petition and briefs, asserted the right to maintain a libel *in rem* under the Jones Act but, in the alternative, insisted that, under the general maritime law, independent of the Jones Act, the libellant was entitled to recover for the failure to supply, and keep in order, proper appliances, properly rigged, and for the unseaworthiness of the vessel in this respect.

It will be noted how closely that case parallels the instant one. In both, though for differing reasons, the libellant was precluded

[1] 16 F. 2d 984, 985.

from relying on the Jones Act which would have avoided all question of a fellow servant's negligence. In both, the libellant then sought to resort to his claim for indemnity for a maritime tort. In the *Pinar Del Rio* case it was held that he had made no case on the latter theory, and in the present case it is held that he has made out such a case. This court, in the earlier case, held two things: first, that a libel *in rem* cannot be maintained under the Jones Act, and, second, that, if the case were treated as the Circuit Court of Appeals had treated it,—as one for recovery of indemnity for a maritime tort,—the record would not support the claim. The court said:

"*The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available.*

"We must treat the proceeding as one to enforce the liability prescribed by Sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke of it as based upon that section. *The evidence would not support a recovery upon any other ground.*" (Italics added.)

These holdings were made in answer to extended argument in the briefs, the petitioner on the one hand contending that the vessel should be treated as an American vessel and as being unseaworthy, respondent contending that, whether British or American, she was not unseaworthy under the law of either nation and that the libellant's injuries were due to the negligence of a fellow servant. What the court said, therefore, was clearly responsive to the contentions of the parties. The present decision does not merely disapprove language used in the earlier case. It overrules the case and alters long-established law without adequate reason.

There has been some suggestion that the holding in the *Pinar Del Rio* case to which I have referred crept into the opinion by inadvertence. But I cannot assume any such thing in view of the proverbial care which all the justices exercise to prevent expression of opinion on questions not necessary to the decision of a case. The decision must be taken at face value as the expression of the views of all the members of the court.

Cases now cited in the opinion of the court were cited and considered by the court in the *Pinar Del Rio* case.[2] The most im-

[2] The Julia Fowler, 49 Fed. 277; The Noddleburn, 28 Fed. 855; The Osceola, 189 U. S. 158; The Navarino, 7 F. 2d 743. The Portland, 213 Fed. 699, not cited, was, however, decided prior to this court's decision in the Pinar Del Rio case.

portant of them, and one on which the Circuit Court of Appeals relied in that case, was *The Osceola*, *supra*.[3] The instant decision not only overrules the *Pinar Del Rio* case but asserts that it is inconsistent with the holdings in *The Osceola*. If this be true it must be because the court has a different conception of the word consequence than that I have.

In *The Osceola* this court, after the fullest consideration, recapitulated the admiralty law respecting the rights of injured seamen, *inter alia*, as follows (p. 175):

"That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen *in consequence* of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." . . . (Italics supplied.)

"That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure."

Unseaworthiness in the abstract does not afford a cause of action. An injury must be "in consequence" of the unseaworthiness,—must be connected with and result from it. And "unseaworthiness" covers a variety of situations variously affecting the work and risks of seamen. Unseaworthiness of the kind on which the court bases its opinion is very different from that due to a faulty mechanism which is an inherent risk to life and limb. If the doctrine now announced is right, a vessel supplied with the newest charts would be unseaworthy if the owner failed to remove old charts from the pilot house; it would make the owner an insurer that, no matter how many adequate facilities were at hand, no insufficient one was anywhere on the ship. Here the so-called unseaworthiness did not consist in want of adequate ropes for the seaman's need. His injury was due entirely to the negligent selection by the mate of a piece of bad rope when ample good rope was at hand. The district court found that the mate was negligent, the Circuit Court of Appeals accepted the finding, and the disposition of the case in this court is on the assumption of the correctness of this finding.

The question, therefore, is whether the ship is liable for the mate's negligent choice of a defective piece of rope when there was plenty of good rope aboard. Under the principles announced in

[3] The Osceola has long been recognized as a leading case. It has been cited for the propositions it laid down at least eighteen times by this court, and nearly two hundred times by lower federal courts.

The Osceola, recovery in admiralty for a maritime tort is barred by the mate's negligence. It was to avoid the interposition of such a defense of a fellow servant's act that the Jones Act made the Federal Employers' Liability Act applicable to the claims of injured seamen.

The court professes to have to choose between the doctrine it reads into the decision in *The Osceola* case and the ruling in *Pinar Del Rio*. But further it asserts that *Pinar Del Rio* is in conflict with *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, an opinion written by the same justice who wrote the opinion in the *Pinar Del Rio* case. The cited authority, as I read it, clearly ruled that in order for a seaman to recover for an injury where the ship is unseaworthy the unseaworthiness must be the direct cause of his injury.

That was an action brought in a state court by an injured seaman against the owner of a motor boat. When the boat left on her voyage a can intended for the use of the crew, supposed to contain coal oil, and so labeled, had been filled with gasoline and the seaman, without notice of this fact, attempted to use the contents and was burned. The supply of life preservers was insufficient and his injuries were aggravated by his having to search for one before he could jump overboard and extinguish the flames consuming his clothing. A verdict and judgment for the seaman was sustained. This court found that erroneous instructions had been given the jury but held the error harmless since the record showed that, without regard to the owner's negligence, the vessel was unseaworthy when she left the dock, and the court held (p. 59): "... if thus unseaworthy and one of the crew received damage *as the direct result thereof*, he was entitled to recover compensatory damages." (Italics supplied.) The court cited, amongst other cases, *The Osceola*.

I am at a loss to understand the citation of this case as authority for the present decision. The reasoning of the court's opinion seems to be this: In the *Carlisle Packing Co.* case recovery was permitted because the injury was the direct result of unseaworthiness. That decision, therefore, requires that the owner be held liable in the instant case although the seaman's injury was not the direct result of unseaworthiness, but of the mate's negligence. It must be upon the basis of such reasoning that the *Pinar Del Rio* case is overruled and the judgment below reversed.

There is some suggestion that the *Pinar Del Rio* case was overruled by *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424. It need only be said that the *Pinar Del Rio* case was not cited in the briefs of counsel in the *Socony* case nor referred to in the opinion and that in fact the *Socony* decision involved and purported to deal only with the general doctrine of assumption of risk and not with the defense of fellow servant's negligence. That the defenses are not the same is made plain by the fact that it has always been held that a fellow servant's negligence is no defense in actions brought under the Federal Employers' Liability Act,[4] whereas assumption of other risks was a defense[5] until Congress recently explicitly acted to abolish it as such.[6]

Indeed, if in the *Socony case*, the suit had involved a fellow servant's negligence instead of the seaman's assumption of the risk involved in the use of an unsafe appliance supplied by the vessel, the case would have been so plainly ruled by earlier decisions[7] that it would have merited no consideration, much less an opinion, by this court.

The statement in the opinion that the defense of a fellow servant's negligence had never been deemed applicable to the owner's obligation to the seaman under the warranty of seaworthiness ignores the point that if the seaman is to recover the unseaworthiness must, under the authorities cited, be the direct cause of the injury. If it is not, but a fellow servant's negligence is the cause, the seaman could not recover,[8] until the law was altered by the Jones Act.

The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles

[4] Illinois C. R. R. Co. v. Skaggs, 240 U. S. 66.

[5] Seaboard Air Line v. Horton, 233 U. S. 492.

[6] Act of Aug. 11, 1939, 53 Stat. 1404.

[7] Jamison v. Encarnacion, 281 U. S. 635; Uravic v. Jarka Co., 282 U. S. 234.

[8] Chelentis v. Luckenbach S.S. Co., 247 U. S. 372; The Rosalie Mahony, 218 Fed. 695; Re Tonawanda Iron & Steel Co., 234 Fed. 198; Payne v. Jacksonville Forwarding Co., 280 Fed. 150; The Daisy, 282 Fed. 261; Wood v. Davis, 290 Fed. 1; Hammond Lumber Co. v. Sandin, 17 F. 2d 760; Benedict Admiralty, 6 Ed., Vol. 1, p. 256.

them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.

Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct. But this is not such a case. The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow, unless indeed a modern instance grows into a custom of members of this court to make public announcement of a change of views and to indicate that they will change their votes on the same question when another case comes before the court.[9] This might, to some extent, obviate the predicament in which the lower courts, the bar, and the public find themselves.

Mr. Justice FRANKFURTER joins in this opinion.

[9] See Minersville School District v. Gobitis, 310 U. S. 586; Jones v. Opelika, 316 U. S. 584, 623; Barnette v. West Virginia State Board of Education, 47 F. Supp. 251, 252-3; West Virginia State Board of Education v. Barnette, 319 U. S. 624.